78-1393

In The
SUPREME COURT OF THE UNITED STATES
October Term, 1978

No. 78-

FRED CHERRY,
Appellant,
v.
THE SECRETARY OF THE TREASURY
OF THE UNITED STATES,
Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

JURISDICTIONAL STATEMENT

FRED CHERRY
Appellant, pro se
Tanama Hotel
Joffre # 1
Santurce,
Puerto Rico 00907

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JURISDICTIONAL STATEMENT

Appellant Fred Cherry, pro se, appeals from the final judgment of the United States District Court for the Southern District of New York, dated and filed on November 20, 1978.

OPINIONS BELOW

The opinion of the United States District Court for the Southern District of New York (three-judge court), which appears in the appendix hereto, pp. 1a-13a, infra,

is reported at 460 F. Supp. 606.

JURISDICTION

This action is one in which the appellant sought an injunction to restrain the enforcement of an act of Congress on the allegation that said act is unconstitutional. The United States District Court for the Southern District of New York (three-judge court) sustained the constitutionality of the act in an opinion which clearly rests upon the merits of the constitutional claims presented by the appellant. The Secretary of the Treasury, appellee herein, was the defendant below. The jurisdiction of the district court was alleged in the complaint under 28 U.S.C. § 1333 or § 1336, and under 28 U.S.C. § 1337 and § 1355.

The judgment of the district court was dated and entered on November 20, 1978 (Appendix, infra, p. 14a). The notice of appeal was filed in the United States District Court for the Southern District of New York on January 19, 1979 (Appendix, infra, pp. 15a-16a).

This court's jurisdiction is invoked under 28 U.S.C. § 1253.

THE STATUTE INVOLVED

19 U.S.C. Section 1305 provides:

§ 1305. Immoral articles; prohibition of importation

(a) All persons are prohibited from importing into the United States from any foreign country any book, pamphlet, paper, writing, advertisement, circular, print, picture, or drawing containing any matter advocating or urging treason or insurrection against the United States, or forcible resistance to any law of the United States, or containing any threat to take the life of or inflict bodily harm upon any person in the United States, or any obscene book, pamphlet, paper, writing, advertisement, circular, print, picture, drawing, or other representation, figure or image on or of paper or other material, or any cast, instrument, or other article which is obscene or immoral, or any drug or medicine or any article whatever for causing unlawful abortion, or any lottery ticket, or any printed paper that may be used as a lottery ticket, or any advertisement of any lottery. No such articles, whether imported separately or contained in packages with other goods entitled to entry, shall be admitted to entry; and all such articles and, unless it appears to the satisfaction of the appropriate customs officer that the obscene or

other prohibited articles contained in the package were inclosed therein without the knowledge or consent of the importer, owner, agent, or consignee, the entire contents of the package in which such articles are contained, shall be subject to seizure and forfeiture as hereinafter provided: Provided, That the drugs hereinbefore mentioned, when imported in bulk and not put up for any of the purposes hereinbefore specified, are excepted from the operation of this subdivision: Provided further, That the Secretary of the Treasury may, in his discretion admit the so-called classics or books of recognized and established literary or scientific merit, but may, in his discretion, admit such classics or books only when imported for noncommercial purposes.

Upon the appearance of any such book or matter at any customs office, the same shall be seized and held by the appropriate customs officer to await the judgment of the district court as hereinafter provided; and no protest shall be taken to the United States Customs Court from the decision of such customs officer. Upon the seizure of such book or matter such customs officer shall transmit information thereof to the

district attorney of the district in which is situated the office at which such seizure has taken place, who shall institute proceedings in the district court for the forfeiture, confiscation, and destruction of the book or matter seized. Upon the adjudication that such book or matter thus seized is of the character the entry of which is by this section prohibited, it shall be ordered destroyed and shall be destroyed. Upon the adjudication that such book or matter thus seized is not of the character the entry of which is by this section prohibited, it shall not be excluded from entry under the provisions of this section.

In any such proceeding any party in interest may upon demand have the facts at issue determined by a jury and any party may have an appeal or the right of review as in the case of ordinary actions or suits.

(b) Repealed. June 25, 1948, c. 645, § 21, 62 Stat. 862.
June 17, 1930, c. 497, Title III, § 305, 46 Stat. 688; June 25, 1948, c. 645, § 21, 62 Stat. 862.

THE QUESTIONS PRESENTED

People who attempt to import, by mail order, single copies of allegedly obscene

articles, of small monetary value, for personal use, are required to travel great distances in order to obtain an adversary hearing on the question of obscenity. The questions presented are:

1. Does 19 U.S.C. § 1305 violate the First Amendment, and the due process clause of the Fifth Amendment, in that it requires people to travel great distances in order to obtain an adversary hearing on the question of obscenity?

2. Does 19 U.S.C. § 1305 violate the First Amendment, and the due process clause of the Fifth Amendment, in that people are required to travel great distances prior to trial, if they wish to inspect their seized property in order to prepare for trial?

3. Does 19 U.S.C. § 1305 violate the First Amendment, and the due process clause of the Fifth Amendment, in that people who import allegedly obscene articles in their baggage while returning on a trip from abroad, are permitted, pursuant to 19 C.F.R. § 18.13, to litigate the question of obscenity at locations close to their homes, while people who import the same articles by mail order are required to travel great distances in order to litigate the question of obscenity?

STATEMENT OF THE CASE

The pro se complaint, filed in April, '76, alleges the following facts: (a) I, the plaintiff [appellant herein] am an individual who resides in Puerto Rico during most of the year, and in New York during the summer. (b) I am compelled by poor health to remain in a warm climate, i.e., away from New York, except during the summer. (c) During the time I reside in Puerto Rico, I attempt to import books, magazines, photographs, and 8 mm. motion picture films from Europe by mail order through the Port of San Juan, Puerto Rico. (d) I attempt to import no more than one such article on each occasion. (e) I have never previously seen the articles which I attempt to import, nor copies thereof. (f) The articles have a retail value ranging from $1 to $30. (g) The articles are intended solely for my personal use. (h) I intend to import similar articles in the future, under similar circumstances. (i) All mail coming from Europe to Puerto Rico is routed through the Port of New York. (j) Because of the small size of the articles I attempt to import, they may be sent only by mail order. (k) The Customs Bureau, pursuant to 19 U.S.C. § 1305, has repeatedly seized these articles of mine in New York [Cf.

Cross-Jurisdictional Statement, No. 778, October Term, '70, in which I attempted to raise the same issues in this court as in the present action. Cross-Appeal dismissed, 400 U.S. 935]. (l) 19 U.S.C. § 1305 requires that judicial proceedings for the forfeiture of these articles be held in the district of seizure, namely the Southern District of New York, and nowhere else. (m) Some of these forfeiture actions are commenced in the winter, at which time I am unable to travel to New York, and more than 60 days before I am able to return to New York. (n) I cannot afford to hire a lawyer to contest each of these seizures. (o) 19 U.S.C. § 1305 requires that I be denied the opportunity to inspect my seized articles at any time, except in the district where they were seized, namely the Southern District of New York. (p) Each year, pursuant to 19 U.S.C. § 1305, the Customs Bureau seizes more than ten thousand pieces of mail from Europe to other individuals in the United States.

The Answer admits the truth of facts i, k,l,o,p, and denies the other facts on the basis of lack of knowledge and information. At a later point in the proceedings, I filed two affidavits, one from my physician attesting to fact b, and one in which I attest to

facts a,c,d,e,f,g,h, and n. Insofar as fact j is concerned, my affidavit states that I have made inquiries, but have been unable to arrange for delivery of the articles I attempt to import, except by mail order. Insofar as fact m is concerned, my affidavit sets forth an example in which a magazine mailed from Europe to my Puerto Rican residence was seized in New York during the winter, at which time I was residing in Puerto Rico, and unable to return to New York. I requested a postponement of the trial. My request was ignored. I was unable to return to New York until more than 60 days after the trial had been held. When I did return to New York, I examined the files of the clerk of the district court, and there, for the first time, I was informed that an ex parte trial had been held in that case, and that the magazine had been found to be in violation of 19 U.S.C. § 1305, and had been ordered to be destroyed. All of the foregoing facts are uncontradicted on the record below.

In August of '76, I filed a motion to convene a three-judge court. Said motion was granted. Then, less than two weeks later, the same court (different judge) in another case held that 19 U.S.C. § 1305 should be

construed to permit a change of venue on the request of a claimant. United States v. Various Articles of Obscene Merchandise [Bruce Long, Claimant], 433 F. Supp. 1132 (1976). The district court felt that if Long's position were upheld, it would moot my claims. Therefore, in the interests of conserving judicial resources, my case was placed on the suspense calendar to await the final disposition of the Long case. The Long case was reversed in the court of appeals. United States v. Various Articles of Obscene Merchandise [Bruce Long, Claimant], 562 F.2d 185 (1967), and, with three Justices of this court dissenting, certiorari was denied sub nom Long v. United States, 436 U.S. 931.

When the Long case had been concluded, my case was taken off the suspense calendar. The three-judge court then dismissed the Complaint in an opinion which clearly discusses and rejects the first two of my "questions presented" herein (Appendix, infra, 1a-13a). The opinion is clearly based on the merits of these two claims, as well as other claims, which I now abandon. The opinion does not mention my third "question presented". The judgment was dated and entered on November 20, '78. Because of a misunderstanding, I then filed a motion

under Rule 60(b)(1), F.R.C.P. This motion contains the affidavits referred to at pages 8-9, supra. The motion was denied in a memorandum by Judge Carter which states: "The Assistant United States Attorney has chosen not to respond to this motion. The motion and supporting papers provide no new information that was not before the court when the complaint in this case was dismissed. Accordingly, the instant motion is without merit and it is hereby denied. It Is So Ordered." The foregoing memorandum was entered on January 8, '79. The notice of appeal was filed on January 19, '79.

THE QUESTIONS ARE SUBSTANTIAL

1. 19 U.S.C. § 1305 REQUIRES PEOPLE TO TRAVEL GREAT DISTANCES IN ORDER TO ASSERT THE RIGHT TO AN ADVERSARY HEARING ON THE QUESTION OF OBSCENITY, AND THEREBY FORCES THEM TO RELINQUISH THAT RIGHT.

These questions are substantial for two reasons. First, they affect thousands of people each year. The government admits, in its Answer, that it seizes over ten thousand pieces of mail each year, pursuant to 19 U.S.C. § 1305. Also, in U.S. v. Various Articles of Obscene Merchandise [Bruce Long, Claimant], 562 F.2d 185, 186 (1977), it is

reported that 573 addressees from 48 states had their property seized under circumstances more or less similar to the circumstances which I present herein, and that these seizures were the subject of a single complaint in the district court. In U.S. v. Various Articles of Obscene Merchandise, 433 F. Supp. 1132 (1976), the same case below, it is reported, at page 1134, that a similar complaint is filed each week in the district court for the Southern District of New York. The district court found, at page 1139, that: "Most of this mail was destined for such faraway places as Rigby, Idaho, Honolulu, Hawaii, Daisy, Tennessee, Big Spring, Texas, Newport Beach, California, and Anchorage, Alaska."

The second reason that these questions are substantial is that the procedural requirements of 19 U.S.C. § 1305 go far beyond causing an "inconvenience" or "burden" to claimants such as myself. On the undisputed facts presented in this case, it is fair to say that the procedural requirements of 19 U.S.C. § 1305 amount to an insurmountable barrier to the excercise of my right, and the right of thousands of other persons, to an adversary hearing in defense of our property rights.

I do not claim that this statute is unconstitutional in the abstract. It is rather the particular circumstances that I, and thousands of other persons find ourselves in, that renders this statute unconstitutional. Lower courts have held that forcing people to travel great distances in defense of their property rights can amount to an unconstitutional barrier. In Jeffries v. Olesen, 121 F. Supp. 463, 475, a district court held that:

> The "fair" hearing essential to meet minimum requirements of any accepted notion of due process includes not only rudimentary fairness in the conduct of the hearing, but also a reasonably fair opportunity to be present at the time and place fixed, to cross-examine any opposing witnesses, to offer evidence, and to be heard, at least briefly in defense. [emphasis supplied, citations omitted]
>
> Had the government moved judicially in a court of law, instead of administratively in an executive department, to put plaintiff out of business, it would be shocking in the extreme to learn of a summons by the court purporting to call upon him to leave his residence in California and cross the continent to Washington, D.C. with his witnesses and his attorney, or else default in the defense of his property right.

In Pedroza v. Secretary of Health, Education and Welfare, 382 F. Supp. 916, 919 (1974), the United States District Court for the District of Puerto Rico (my home district), held that:

> The plaintiff was not afforded an oral hearing at any time surrounding the action taken by the Appeals Council, and the Secretary's invitation that plaintiff travel to Washington, D.C. in order to secure a hearing before the Appeals Council is, for all practical purposes, considered invalid by this Court. Jeffries v. Olesen, 9 Cir., 121 F. Supp. 463. [emphasis supplied]

In Rew v. Ward, 402 F. Supp. 331, 335 (1975), another district court held that:

> Should a petitioner be granted a hearing, in order for the hearing to be meaningful the applicant must be present along with her witnesses. However, the BMCR [Board for Correction of Military Records] sits only in Washington, D.C. Thus an airman desiring a hearing is faced with the heavy and frequently insurmountable burden of travel and lodging expenses for her and her witnesses. The home of the plaintiff herein is Richmond, California. [footnote containing citations omitted]

This court, although it has not yet dealt with this precise question, has recently rendered opinions which seem

persuasive. In Boddie v. Connecticut, 401 U.S. 371, 379-380, this court held that: "[T]he right to a meaningful opportunity to be heard within the limits of practicality, must be protected against denial by particular laws that operate to jeopardize it for particular individuals." In Goldberg v. Kelly, 397 U.S. 254, 268-269, this court held that: "The opportunity to be heard must be tailored to the capacities and circumstances of those who are to be heard."

It appears that this court has recently granted review to two cases which involve questions quite similar to the first question presented herein. These two cases are Stafford v. Briggs, No. 77-1546 and Colby v. Driver, No. 78-303. I would like to point out that my situation is far worse than the situation of the appellants in those two cases. First, I have alleged and proven that it would be impossible for me to travel to the distant forum to which I would have to travel. Second, as the court below held, in Driver v. Helms, 577 F.2d 147, 157 (1978), those appellants "are not without protection. A district court has broad discretionary power "[f]or the convenience of witnesses, in the interest of justice, [to] ..... transfer any civil action to any

other district ..... where it might have been brought." 28 U.S.C. § 1404(a)." In my case, it has been specifically decided, in U.S. v. Various Articles of Obscene Merchandise [Bruce Long, Claimant], 562 F.2d 185 (1977), that a change of venue is impermissable. Third, in my case, I am even denied a reasonable opportunity to obtain notice. The government admits that 19 U.S.C. § 1305 denies me, and other claimants, the opportunity to examine our seized property in order to prepare for trial, except in New York. I have alleged and proven that I have never seen the articles I attempt to import, nor copies thereof. I have alleged and proven that I cannot go to New York, except in the summer. I have shown an example in which I never had the opportunity to examine my seized property before it was destroyed. Therefore, it would seem that I have shown lack of notice.

In Freedman v. Maryland, 380 U.S. 51, this court struck down a motion-picture censorship scheme on the grounds that the censorship scheme involved therein was burdensome. This court held, at 380 U.S. 59, that: "The exhibitor's stake in any one picture may be insufficient to warrant a protracted and onerous course of

litigation." The same principle should be applied herein. That is, the importer's stake in a single item is insufficient to warrant travelling to a distant location in order to litigate, even assuming the importer is able to make such a trip. In my particular circumstances, it is not even possible for me, on some occasions, to make such a trip (p. 8, supra). Of course I do have the option of requesting a postponement until I am able to travel to New York. But then I am forced to relinquish my right to have my case concluded within 60 days, in accordance with this court's opinion in United States v. Thirty-Seven Photographs, 402 U.S. 363, 373-374. Furthermore, it would seem to be a matter entirely within a court's discretion whether or not to grant a postponement, and if a postponement is not granted, there doesn't seem to be anything I can do about it (p. 9, supra).

Last term, in the case of Long v. United States, No. 77-1226, the brief for the United States argued, at page 6, that: "[T]he danger of indiscriminate distribution of obscene material, if such material is permitted to go beyond the port of entry, is a real and not imagined one."

It seems difficult to understand how

the government can make such an assertion, in the present context, when the Secretary of the Treasury himself has promulgated regulations, which have been in effect for years, and which permit a traveller to bring obscene material beyond the port of entry. I refer to 19 C.F.R. (revised as of 4/1/78) § 18.13, which provides in part:

> (a) Baggage may be forwarded in bond to another port of entry, or to a Customs station listed in § 101.4 of this chapter, at the request of the passenger, the transportation company, or the agent of either, with the use of a baggage manifest described in paragraph (b) of this section without examination or assessment of duty at the port or station of first arrival.

The ports of entry are listed in 19 C.F.R. § 101.3. There are more ports of entry than federal judicial districts. San Juan, Puerto Rico, is a port of entry. Furthermore, there are many ports of entry far removed from any seacoast or border; for example, Salt Lake City, Utah.

The existence of 19 C.F.R. § 18.13 also undermines the government's assertion, on page 7 of its brief in the Long case (page 17, supra), that practical problems militate against my position. If the government is

able to inspect baggage at a point beyond the port of first entry, then the government could follow a similar procedure in the case of mail items.

It would also seem reasonable, in the light of 19 C.F.R. § 18.13, for the government to allow the mail-order importer a meaningful opportunity to inspect his seized property. That is, it doesn't seem to be much of a burden for the government to mail seized articles to the United States Attorney's office in the mail-order importer's home district, rather than the mail-order importer travelling great distances to inspect his property to prepare for trial, or even to decide whether or not to litigate.

Recenty, this court, in Shaffer v. Heitner, 433 U.S. 186, 206, held that: "We think the time is ripe to consider whether the standard of fairness and substantial justice set forth in International Shoe [International Shoe Co. v. Washington, 326 U.S. 310] should be held to govern actions in rem as well as in personam."

The government, in the Long case (page 17, supra), argues, on page 8 of its brief, that Shaffer should not apply, in the present context. Again, it is difficult to understand the logic of this argument, in the light of

19 C.F.R. § 18.13. Jurisdiction does not rest in the port of first entry, in the case of travellers who attempt to import alleged obscene articles, when those travellers invoke 19 C.F.R. § 18.13. Therefore, there is no reason why jurisdiction must rest in the port of first entry in the case of mail-order importers. Actually, it would seem that there is more reason for jurisdiction to rest in the district of the port of first entry, in the case of a traveller, than in the case of a mail-order importer. In the case of a traveller, both the traveller and his property pass through the port of first entry. Also, the traveller chooses the port of first entry, but the mail-order importer must accept the port of first entry selected by the government (fact "i", page 7, supra). Furthermore, the person who imports small articles without leaving the country, can import only by mail order (fact "j", pages 7,9, supra).

The government, in the Long case (page 17, supra), argues, on page 7 of its brief, that: "On the other hand, it is not clear to us that because few claimants appear at proceedings at the port of entry, the exercise of constitutional rights is unduly burdened..... More likely than not, the

absence of claimants reflects a realistic appraisal that the materials are in fact not worth retrieving." Exactly! In the case of those claimants who are able to travel great distances on short notice, such claimants are not willing to bear the cost of travelling such distances in order to retrive articles of small monetary value. But that would seem to indicate that constitutional rights are being unduly burdened.

2. 19 U.S.C. § 1305, BY REQUIRING MAIL-ORDER IMPORTERS TO TRAVEL GREAT DISTANCES TO OBTAIN AN ADVERSARY HEARING ON THE QUESTION OF OBSCENITY, WHILE ALLOWING TRAVELLERS TO LITIGATE THAT QUESTION CLOSE TO THEIR HOMES, UNCONSTITUTIONALLY DISCRIMINATES AGAINST MAIL-ORDER IMPORTERS.

In my brief attached to my motion to convene a three-judge court, filed August, '76, I stated: "If the government wishes to claim that it would be a hardship for them if a change of venue were permitted in these forfeiture cases, then how is it that a procedure equivalent to a change of venue is permitted for people who attempt to import alleged obscenity in their luggage when returning from a trip to Europe? I am referring to 19 C.F.R. 18.13, which provides that

a traveller who arrives in New York from Europe and intends to continue his trip to, for example, Puerto Rico, can have his baggage sealed "in bond" and then inspected at his final destination in Puerto Rico. Then, if his baggage is found to contain material deemed obscene, he can litigate the matter in the United States district court for the district of Puerto Rico. On the other hand, I who live in Puerto Rico, am forced to come to New York if I wish to litigate the question of obscenity. There is no practical reason why a traveler can be given the choice of forum in this manner, while a person who imports by mail order is denied the same choice. This is an example of discrimination which is so unjustified as to violate the "due process" clause of the Fifth Amendment."

It is clear that this brief was considered by the district court. See footnotes # 6 and 8 of the opinion of the district court, page 13a, infra.

I maintain that raising the issue in a brief is sufficient to raise the issue in the district court. In Sherman v. Halbauer, 455 F.2d 1236, 1242, a court of appeals held that an issue may be raised in a memorandum of law and that Rule 15, F.R.C.P. requires

that an issue raised in a brief be construed as an amendment to the pleadings. This case is cited with approval in Moore's Federal Practice, ¶ 56.10, Notes 16, 17. Also, see Moore's Federal Practice, ¶ 15.13[2], footnote 2, which states: "The principles of Rule 15(b) have been applied to issues raised on motion as well as at trial", followed by a long string of citations. Also see "Federal Practice and Procedure" by Wright and Miller, § 2881 (harmless error).

CONCLUSION

For these reasons, this court should note probable jurisdiction of this appeal.

Respectfully submitted,

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Appellant, pro se

March '79

APPENDIX

Filed November 15, '78 U.S.D.C. S.D.N.Y.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

FRED CHERRY, Plaintiff, -against- THE SECRETARY OF THE TREASURY OF THE UNITED STATES, Defendant.	76 Civ. 1561 (RLC) OPINION # 47856

FRED CHERRY,
Plaintiff, Pro Se

FREDERICK P. SCHAFFER, Assistant United States Attorney (Robert B. Fiske, Jr., United States Attorney for the Southern District of New York), for Defendant.

Before: MULLIGAN, Circuit Judge,
and CARTER and CONNER,
District Judges.

CARTER, D.J.

OPINION

Plaintiff here challenges the constitutionality of 19 U.S.C. § 1305, both facially and as applied, and seeks to enjoin its enforcement. He claims that this statute, which prohibits the importation of obscene articles into the United States and provides for seizure and forfeiture of such articles, violates the First and Fifth Amendments in that (1) it fails to provide for a change in venue; (2) it allows the government rather than the claimant to retain possession of the seized articles during the pendency of the forfeiture proceedings; and (3) it does not permit the examination of such articles except in the jurisdiction where they are seized.

Background

The plaintiff, Fred Cherry, has been a party to two other actions regarding similar issues. In United States v. Various Articles of Obscene Merchandise, Schedule 979, 73 Civ. 4146, a three-judge court in this district held that Cherry lacked standing to raise the same constitutional objections that he now advances. In the previous action customs officials had confiscated allegedly obscene material when it was on route to

Cherry's Brooklyn address, and the three-judge court found that the absence of a provision permitting a change of venue did not injure Cherry since it merely required him to cross the Brooklyn Bridge from the Eastern District of New York to the Southern District of New York.

The second case involving Cherry was the forfeiture action which generated the factual basis for the present suit. In United States v. Various Articles of Obscene Merchandise, Schedule 1350, 76 Civ. 791, Cherry contested the seizure of articles addressed to his winter residence in Puerto Rico. Judge Cooper of this court presided over a jury trial at which the materials were found to be obscene. Although Cherry Raised his constitutional arguments as affirmative defenses in his answer in the forfeiture action, he did not pursue these contentions and the court made no ruling on them.[1] The forfeiture case was not appealed.

Plaintiff then brought the instant action, seeking to have the statute in question declared unconstitutional. He attempted to overcome his earlier difficulty with standing by pointing to the more recent case where his inability to obtain a change in venue forced him to travel to New York to

challenge the confiscation of materials addressed to his home in Puerto Rico. In August of 1976, plaintiff moved pursuant to 28 U.S.C. § 2282 to have a three-judge court hear his constitutional claim.[2] This three-judge court was then convened,[3] but shortly thereafter Judge Frankel rendered a decision in United States v. Various Articles of Obscene Merchandise, Schedule No. 1303, 433 F. Supp. 1132 (S.D.N.Y. 1976), in which he held that the venue provisions of 19 U.S.C. § 1305 violate the First Amendment. Because of the similarity between that case and Mr. Cherry's claims, the instant case was placed on suspense pending the disposition of the government's appeal of Judge Frankel's decision.

All appeals of Judge Frankel's ruling have now been exhausted, and the instant case may now be removed from the suspense calendar. The parties have agreed that their pleadings and communications with respect to the convening of a three-judge court may be taken as their submissions regarding a dismissal motion by the government. For the reasons set forth below, defendant's motion to dismiss is granted.

Venue Provisions

Plaintiff's first constitutional argument here is identical with that of the claimant in United States v. Various Articles of Obscene Merchandise, Schedule No. 1303, 433 F. Supp. 1132 (S.D.N.Y. 1976) (Frankel, J.).[4] In that case, Judge Frankel found that the claimant's First Amendment rights were infringed because the fixed venue provisions made the preservation of these rights costly and troublesome. Id. at 1139. Judge Frankel suggested that the constitutionality of the statute as a whole could be preserved if the government notified potential claimants that the forfeiture could be challenged in the district of their residence. Id. at 1139.

Rather than accept this suggestion the government appealed, and the trial court was reversed. United States v. Various Articles of Obscene Merchandise, Schedule No. 1303, 562 F.2d 185 (2d Cir. 1977). In its opinion the Second Circuit expressed considerable skepticism regarding the wisdom of devoting scarce governmental resources to the interception of supposedly obscene materials from abroad. Id. at 188-89. The court, nevertheless, found that it was Congress' intent to confine venue in such cases to the port of entry where seizure is made, id. at 188-89,

and that the "plenary power" of Congress with regard to the importation of obscene materials immunizes this provision from constitutional challenge. Id. at 189. The Supreme Court denied certiorari in that case, sub nom. Long v. United States, 46 U.S.L.W. 3737 (May 30, 1978), and the opinion of the Second Circuit is therefore binding upon this court.

The disposition by the Second Circuit appears to foreclose two aspects of constitutional arguments advanced by Cherry. Since 19 U.S.C. § 1305 has been held constitutional, Cherry has no general First Amendment claim. Furthermore, to the extent that he contends that the venue provision impairs his ability to prepare for trial by preventing examination of the seized materials outside of New York, the Second Circuit decision upholding fully the fixed venue provision disposes of this claim.[5]

In recent correspondence with this court, plaintiff has asserted that his case should remain on the suspense calendar despite final disposition of the matter that triggered the assignment of this case to limbo. Cherry argues that a recent decision of this court, United States v. Various Articles of Obscene Merchandise, No. 78 Civ.

2475, July 28, 1978 (Leval, J.), alters the substantive standard for obscenity. That case, however, has no effect on plaintiff's present cause of action. Here, Cherry has disavowed any challenge to the substance of the obscenity laws[6] and has focused entirely on what he believes to be constitutionally defective procedures in 19 U.S.C. § 1305. Moreover, as to the question of whether the particular items that plaintiff imported were obscene, the determination of the jury in the forfeiture proceedings, No. 76 Civ. 791, is res judicata. Therefore, plaintiff's constitutional attack on the venue provision is without merit.

Possession During Pendency of Litigation

Plaintiff's second argument is grounded in the Fifth Amendment. He contends that retention of the seized articles by the government during the pendency of the forfeiture proceedings constitutes a deprivation of liberty or property without due process. In the abstract, this argument is not without merit where the articles themselves are not hazardous instrumentalities and where the seized materials are easily duplicated so that there is little danger that destruction of the originals would

prevent the government from prosecuting its case. However, the decisions of the Supreme Court present the plaintiff with an insurmountable barrier.

In United States v. Thirty-Seven (37) Photographs, 402 U.S. 363, 376 (1971), a plurality of the Supreme Court held that:

> [O]bscene materials may be removed from the channels of commerce when discovered in the luggage of a returning foreign traveler even though intended solely for his private use.

Two years later, a majority of the Court endorsed this position in United States v. 12 200-Ft. Reels of Super 8MM Film, 413 U.S. 123 (1973). By implication, materials so confiscated may be held by the government pending a determination ow whether they are subject to forfeiture, as long as the government complies with the constitutional requirements for swift disposition of the case as required by 19 U.S.C. § 1305. United States v. Thirty-Seven (37) Photographs, supra, at 373-74. In Heller v. New York, 413 U.S. 483, 489 (1973), the Court reaffirmed this position when it noted that Thirty-Seven Photographs had not required any adversary hearing prior to initial seizure.[7]

It is clear, then, that the government

may retain possession of confiscated materials seized by customs officials, as long as an adversary proceeding to determine whether the articles are obscene is held promptly. Plaintiff's argument that his case is distinguishable from prior Supreme Court decisions because he has had no opportunity whatever to peruse the imported articles is unpersuasive. Neither United States v. Thirty-Seven Photographs, supra, nor United States v. 12 200-Ft. Reels of Super 8MM. Film, supra, found any significance in the fact that the claimants were travelers returning with materials that they might already have examined closely. Arguments to that effect in the government's brief in the latter case[8] were not adopted by the Court and have no precedential value.

Furthermore, the cases cited by the plaintiff are inapposite. In Perial v. Morse, 482 F.2d 515, 525 (2d Cir. 1973), and Ricciardi v. Thompson, 480 F.2d 167 (7th Cir. 1973), courts approved provisions designed to limit the degree to which a pre-hearing seizure would serve as a restraint on free speech. Both cases, however, involved the seizure of films already being shown commercially within the United States. In each case the court suggested that only a

single print of the film was needed for evidentiary purposes, and that the film could be copied so that it could be shown during the pendency of the obscenity determination. Perial v. Morse, supra, at 525; Ricciardi v. Thompson, supra, at 170. Mr. Cherry's case calls for a different balancing of interests. Plaintiff here has disavowed any intent to circulate the materials that he has imported, so the First Amendment rights of audiences other than the claimant are not implicated. Nor is there any allegation that Cherry suffers financial hardship akin to that of the theater owners whose livelihood depends upon their showing erotic films for profit. The primary interest asserted by Cherry is the right to personal use of the articles during the interim period.[9] Where the plaintiff will receive the materials after a prompt hearing if they are found not to be obscene, his interest in immediate access for recreational purposes is de minimis. The Supreme Court has determined that, in contrast to justice, pleasure delayed need not be pleasure denied.

The Supreme Court has thus found no constitutional defect in the temporary retention of allegedly obscene materials pending a court determination. This,

together with the Second Circuit's holding that the fixed venue provision of the statute is permissible, vitiates Cherry's argument that his rights are violated when, during the pendency of the forfeiture proceedings, he is prevented from enjoying the materials anywhere except in the United States Attorney's office in the district where the materials were seized.

None of the plaintiff's claims, then, present a cause of action upon which relief can be granted. Accordingly, defendant's motion to dismiss the complaint is granted.

IT IS SO ORDERED.

Dated: New York, New York
November 9, 1978

[signed]
WILLIAM H. MULLIGAN
U.S.C.J.

[signed]
ROBERT L. CARTER
U.S.D.J.

[signed]
WILLIAM C. CONNOR
U.S.D.J.

FOOTNOTES

1. Since the constitutional issues were never litigated nor ruled upon in the forfeiture proceedings, the doctrine of collateral estoppel does not apply. Sea-Land Services, Inc. v. Gaudet, 414 U.S. 573, 593 (1974).

2. Although three-judge courts were abolished for most purposes in August, 1976, Pub. L. 94-381, §§1, 2, this change was not made retroactive to cases already filed.

3. Chief Judge Kaufman signed an order on August 13, 1976, designating the members of this three-judge court.

4. Here, as in the case before Judge Frankel, the plaintiff merits recognition as one of the few addressees of confiscated materials who has devoted time and energy to resisting forfeiture.

5. In a letter to this court dated August 25, 1976, the government asserts that plaintiff's claim that his ability to prepare for trial is impared is barred by res judicata. This contention is based on the finding in United States v. Various Articles of Obscene Merchandise, Schedule No. 979, 73 Civ. 4146 (Memorandum, June 27, 1974 at 6)(three-judge court), that Cherry had been given an adequate opportunity to examine the articles in question in that case. However, the instant case involves a different set of operative facts, so the doctrine of res judicata cannot apply.

FOOTNOTES
(Continued)

6. Plaintiff states on page 4 of his Motion to Convene a Three-Judge Court:

> I do not question the right of the government to censor so-called "obscenity" or to seize this material in New York in the first place. I am merely questioning the procedural aspects of this particular censorship scheme (i.e., the fact that no change of venue is permitted).

7. Although in Heller the seizure was preceded by the issuance of a warrant by a magistrate who had viewed the article in question, the plenary power of customs officials to seize potentially obscene materials entering the country renders any possible distinction from the present case unimportant. See United States v. 12 200-Ft. Reels of Super 8 MM. Film, 413 U.S. 123, 125 (1973).

8. Brief of the United States, p. 15, quoted in Plaintiff's Motion to Convene a Three-Judge Court, p. 11.

9. Letter of plaintiff addressed to the court, dated September 1, 1976.

Filed November 20, '78 U.S.D.C. S.D.N.Y.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

FRED CHERRY, Plaintiff, -against- THE SECRETARY OF THE TREASURY OF THE UNITED STATES, Defendant.	76 Civ. 1561 (RLC) JUDGMENT

A three judge Court having been convened constituting the Honorable William H. Mulligan, U.S.C.J., Robert L. Carter, U.S.D.J. and William C. Conner, U.S.D.J., and the Court thereafter on November 15, 1978, having handed down its opinion granting motion to dismiss, it is,

ORDERED, ADJUDGED and DECREED: That the complaint be and it is hereby dismissed.

Dated: New York, N.Y.
November 20, 1978

[signed] Raymond F. Burghardt
Clerk

Filed January 19, '79 U.S.D.C. S.D.N.Y.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

FRED CHERRY, Plaintiff, -against- THE SECRETARY OF THE TREASURY OF THE UNITED STATES, Defendant.	76 Civ. 1561 RLC

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

Notice is hereby given that Fred Cherry, the plaintiff above named, hereby appeals to the Supreme Court of the United States from the final judgment, entered in this action on November 20, 1978.

This appeal is taken pursuant to 28 U.S.C. § 1253.

Pursuant to Rule 13(a) of the Local Civil Rules of this court, it is hereby stated that the names of the parties to the judgment are those given above in the caption. It is further stated that the attorney of record for the plaintiff and his

address are: Fred Cherry, pro se; Hotel Tanama, Joffre # 1, San Tursi, Puerto Rico 00907: and that the attorney of record for the defendant and his address are: Frederick P. Schaffer, Esq., Assistant United States Attorney; One St. Andrew's Plaza, New York, N.Y. 10007.

[signed]

FRED CHERRY
Plaintiff, pro se
Hotel Tanama, Joffre # 1
San Tursi, Puerto Rico 00907

78-1393

In the Supreme Court of the United States

OCTOBER TERM, 1978

FRED CHERRY, APPELLANT

v.

THE SECRETARY OF THE TREASURY OF THE UNITED STATES

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

MOTION TO AFFIRM

WADE H. MCCREE, JR.
Solicitor General
Department of Justice
Washington, D.C. 20530

In the Supreme Court of the United States

OCTOBER TERM, 1978

78-1393

FRED CHERRY, APPELLANT

v.

THE SECRETARY OF THE TREASURY OF THE UNITED STATES

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

MOTION TO AFFIRM

OPINION BELOW

The opinion of the three-judge court (J.S. App. 1a-13a) is reported at 460 F. Supp. 606.

JURISDICTION

This action was brought to enjoin the enforcement of a federal statute on the ground that it offends the First and Fifth Amendments to the Constitution. A three-judge district court was convened under the authority of 28 U.S.C. (1970 ed.) 2282.[1] The district court judgment dismissing the complaint (J.S. App. 14a) was entered on November 20, 1978. A notice of appeal to this Court was filed on January 19, 1979,

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[1]Section 2282 was repealed as of August 12, 1976, but the repeal was made effective only as to actions commenced after that date. Pub. L. No. 94-381, 90 Stat. 1120. This action was commenced in April 1976.

and the jurisdictional statement was filed on March 12, 1979. The jurisdiction of this Court is invoked under 28 U.S.C. 1252.

QUESTION PRESENTED

Whether the venue provision in 19 U.S.C. 1305(a), which provides that forfeiture proceedings against obscene materials imported into the United States shall be brought in the district in which they are seized, is unconstitutional.

STATEMENT

Appellant is a resident of Brooklyn who spends each winter in Puerto Rico. He orders magazines and books from time to time from Europe. He has had some addressed to his New York residence and some to his winter residence in Puerto Rico. On several occasions, materials addressed to appellant have been seized by the Customs Service upon their arrival in New York and subjected to forfeiture under 19 U.S.C. 1305(a). On at least one occasion, materials addressed to appellant's residence in Puerto Rico were seized in New York as they arrived in this country via the international mails (J.S. 7-8). Under the provision of Section 1305(a) that lays venue for forfeiture proceedings in the district in which the materials are seized, a forfeiture proceeding against the materials was brought in the Southern District of New York (J.S. App. 3a).

Appellant brought this action in the District Court for the Southern District of New York challenging the constitutionality of the forfeiture statute, 19 U.S.C. 1305(a), on the ground that the statute provides that venue shall lie in the district in which the materials are seized rather than the district in which the addressee of the materials resides. That provision, he contended, unconstitutionally burdens the right of the addressee to challenge the forfeiture.

Relying on the recent decision of the Second Circuit in *United States* v. *Various Articles of Obscene Merchandise*, 562 F. 2d 185 (2d Cir. 1977), cert. denied, 436 U.S. 931 (1978), the district court dismissed the complaint (J.S. App. 1a-13a). The court held that the venue provision in Section 1305(a) does not unconstitutionally burden the claimant's right to defend in the forfeiture proceeding, and that there is no constitutional requirement that the forfeiture proceeding be brought in the addressee's district.

ARGUMENT

1. Appellant's challenge to the venue provision in 19 U.S.C. 1305 is without merit. Congress enjoys "broad, comprehensive powers '[t]o regulate Commerce with foreign Nations.' Art. I, §8, cl. 3. Historically such broad powers have been necessary to prevent smuggling and to prevent prohibited articles from entry." *United States* v. *12 200-Ft. Reels of Film*, 413 U.S. 123, 125 (1973); see *United States* v. *Ramsey*, 431 U.S. 606, 619 (1977). In the exercise of this power, Congress has provided, in 19 U.S.C. 1305, for the seizure and forfeiture of obscene materials at the port of entry. The constitutional authority of Congress to authorize forfeiture actions for obscene materials imported into the country is clear. See *United States* v. *12 200-Ft. Reels of Film*, *supra; United States* v. *Thirty-Seven Photographs*, 402 U.S. 363 (1971). Thus, the only question presented here is whether the portion of Section 1305(a) that lays venue for such forfeiture actions in the district of seizure is unconstitutional.

The rule contended for by appellant—venue at the addressee's residence—would defeat the very congressional purpose in barring the materials from entry into the country. Moreover, it would interfere with the intent that forfeiture proceedings under Section 1305(a) be instituted with dispatch. The delay attendant upon

transferring the seized materials to the various districts to which they are addressed, in order that forfeiture proceedings may be instituted in those districts, would render it much more difficult to meet the short time deadlines contemplated by Section 1305(a).[2]

The venue provision in Section 1305 is consistent with the historical venue for *in rem* proceedings: the place where the property is found. See *Four Packages* v. *United States*, 97 U.S. 404 (1878); *Keene* v. *United States*, 9 U.S. (5 Cranch) 303, 310 (1809); *Clinton Foods, Inc.* v. *United States*, 188 F. 2d 289, 292 (4th Cir.), cert. denied, 342 U.S. 825 (1951); see also 28 U.S.C. 1395(b). A forfeiture proceeding is brought against the property, not against any possible claimant. Because the action is brought against the property, it is unnecessary, and it is often impossible, to determine who has the primary interest in the property prior to the institution of the forfeiture action. Accordingly, requiring that forfeiture actions under Section 1305(a) be brought in the districts where the addressees of the materials reside would not only be inconsistent with the traditional venue for *in rem* actions, it would also create great difficulties in the administration of the statute. Many of the obscene materials imported into the country are addressed to persons who did not solicit the materials and who have no interest in receiving them or in contesting the forfeiture action.

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[2]In *United States* v. *Thrity-Seven Photographs, supra*, the Court construed Section 1305 to require that a forfeiture proceeding be instituted within 14 days of the seizure of the allegedly obscene goods and that the proceeding be completed within 60 days of its commencement. The legislative history cited by the Court in *Thirty-Seven Photographs* makes clear that Congress intended that the forfeiture proceedings were to be expedited in part by being brought in the district of seizure by "the nearest United States district attorney having authority under the law to proceed to confiscate" (402 U.S. at 371, quoting from 72 Cong. Rec. 5420 (1930) (remarks of Sen. Pittman)).

Moreover, obscene materials seized in a port of entry are often seized in large bulk packages containing many smaller items to be forwarded to a variety of addressees. A single forfeiture proceeding is brought against all the obscene materials as a lot, and notice is then sent to each of the addresses in case any should choose to challenge the forfeiture. To sort out the various individual packages for further shipment to inland districts, where the Customs Service does not have offices and where the addressees may have no interest in resisting forfeiture, would impose an unnecessary burden on the statutory procedure. See *United States* v. *Various Articles of Obscene Merchandise, supra*, 562 F. 2d at 188-189.

2. An analogous venue provision in another obscenity statute has been upheld by this Court. Section 1461 of Title 18 defines as nonmailable all obscene materials and makes it a criminal offense to use the mails for the delivery of any such materials. By virtue of 18 U.S.C. 3237, venue for the offense described in Section 1461 lies in any district "from, through, or into which such commerce or mail matter moves."

In *Reed Enterprises* v. *Clark*, 278 F. Supp. 372 (D.D.C. 1967), aff'd mem., 390 U.S. 457 (1968), a distributor challenged the venue provision as applied to Section 1461 on the ground that it imposed an unconstitutional burden on distributors of materials possibly subject to the Section. The venue provision, plaintiffs alleged, would enable the government to prosecute distributors not in the district from which the distribution was initiated, but in every district into which the materials were sent. 278 F. Supp. at 375. The three-judge court upheld the constitutionality of the venue provision, and this Court summarily affirmed that judgment. The district court noted that in considering questions of venue, this Court has

"never questioned the power of Congress to designate proscribed offenses as continuing offenses by regulation of the use of agencies of interstate commerce" (278 F. Supp. at 380). Accordingly, the court upheld the constitutionality of the venue provision even though it permitted the prosecution in a variety of distant districts of defendants who mail materials from their home districts.[3] See also *Hamling* v. *United States*, 418 U.S. 87, 106 (1974).[4]

3. This Court has noted that prosecutions—particularly in criminal cases—may impose serious hardships if they are brought in places distant from the defendant's residence. See *United States* v. *Johnson*, 323 U.S. 273 (1944). But this concern has consistently been regarded as an "objection to the policy of the law, not to the power of Congress to pass it." *Armour Packing Co.* v. *United States*, 209 U.S. 56, 77 (1908); *Hyde* v. *Shine*, 199 U.S. 62, 78 (1905); *Johnston* v. *United States*, 351 U.S. 215, 220-221 (1956); *Travis* v. *United States*, 364 U.S. 631 (1961); *Platt* v. *Minnesota Mining & Manufacturing Co.*, 376 U.S. 240, 245 (1964). Indeed, this Court has never held a federal venue statute unconstitutional, and in a case

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[3]The court noted that its ruling was consistent with that of every other court that had addressed the issue. See *United States* v. *West Coast News Co.*, 357 F. 2d 855 (6th Cir. 1966), rev'd on other grounds sub nom. *Aday* v. *United States*, 388 U.S. 447 (1967); *United States* v. *Luros*, 243 F. Supp. 160, 167-168 (N.D. Iowa), cert. denied, 382 U.S. 956 (1965); *United States* v. *Frew*, 187 F. Supp. 500 (E.D. Mich. 1960); *Toscano* v. *Olesen*, 184 F. Supp. 296 (S.D. Cal. 1960).

[4]Department of Justice policy forbids unrestricted "forum shopping" in cases brought under Section 1461, as noted in our memorandum in *Blucher* v. *United States*, No. 78-571, a copy of which we have provided to appellant. Where the prosecution is brought in a district in which the defendant has solicited business or mailed materials in the regular course of his business, however, the prosecution in that district violates neither the Constitution nor Department of Justice policy.

such as this one, where the materials are forfeited in the same district in which they are seized, there is ample constitutional basis for laying venue in that district.

Even if the venue provision in Section 1305(a) might be deemed unduly burdensome in some other factual setting, it is not so with respect to appellant. As appellant admits, he spends summers of each year in New York; the rest of the year he lives in his winter residence in Puerto Rico. He is therefore not inconvenienced with respect to any forfeiture proceedings that may be brought against materials addressed to him during the portion of the year that he resides in New York. His complaint is that he suffers an inconvenience if a forfeiture is brought in New York during the period of the year when he is in Puerto Rico, and he elects to contest the forfeiture *pro se*. The district court noted that this sequence of events had occurred once before, and that appellant had contested the forfeiture, but without even raising the constitutional objection he now asserts (J.S. App. 3a).

Even assuming, as appellant contends, that this scenario is likely to recur, the burden on his ability to conduct a pro se defense to the forfeiture action is not significant. Because he returns to his permanent residence in New York each year for the summer, the only inconvenience imposed upon him when materials addressed to him are seized in New York is that he must seek a continuance of the forfeiture action until his return to New York. Whatever the burden on permanent residents of districts distant from particular ports of entry where obscene materials are seized, the inconvenience to appellant is minimal, and it provides no basis for upsetting the traditional venue provision for the *in rem* forfeiture proceeding authorized by Section 1305(a).

4. Appellant asserts (J.S. 21-23) that Section 1305(a) and certain Customs Service regulations deprive mail order customers of the equal protection of the laws by drawing an irrational distinction between travellers who carry obscene materials into the country and mail order patrons who seek to import such materials through the international mails. The venue provision of Section 1305(a) applies differently to these two classes of persons, appellant contends, because 19 C.F.R. 18.13 permits the baggage of international passengers who arrive in New York on their way to another port of entry to be shipped in bond and examined at the latter port of entry. If, upon examination there, the baggage is found to contain obscene materials, the materials are seized at that place and, under Section 1305(a), a forfeiture proceeding is instituted in the district of that port of entry.

The reason for the customs regulation is obvious: it is often inconvenient to international travelers or carriers to submit to full baggage inspection at the first port of entry reached in this country, and a subsequent inspection is equally practical if the traveler will pass through another port of entry on the way to his ultimate destination. The same is not true of international mail that is routinely inspected at a single port of entry, such as New York, and then forwarded to inland destinations. It would be exceedingly cumbersome to separate those materials destined to pass through another port of entry for subsequent reinspection in that port of entry. In any event, even if the mail would pass through another port of entry before its ultimate delivery, that port of entry would not necessarily be located in the addressee's home district. In sum, the regulation that accommodates international travelers could not readily be extended to apply in the very different setting of international mail. The distinction drawn between the procedures

applicable to international mail and international travel is thus a rational one and does not constitute a denial of equal protection to mail order customers such as appellant.

CONCLUSION

The judgment of the three-judge court should be affirmed.

Respectfully submitted.

WADE H. MCCREE, JR.
Solicitor General

APRIL 1979

DOJ-1979-04